Hallandale Rehabilitation and Convalescent Center *and* 1115 Nursing Home and Hospital and Service Employees Union—Florida H.E.R.E., AFL–CIO, affiliated with 1115 District Council, H.E.R.E., AFL–CIO, Petitioner. Case 12–RC–7548

February 28, 1994

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAND STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

The National Labor Relations Board has considered determinative challenges and objections to an election held October 22, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 36 for and 30 against the Petitioner, with 9 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of both parties' exceptions and briefs,[1] and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election.

I. CHALLENGED BALLOTS

With respect to the challenged ballots, we adopt in the absence of exceptions the hearing officer's recommendations to sustain the challenges to the ballots of Monique Gustave and Marie Joseph and to overrule the challenges to the ballots of Denish Maharaj, Jennifer Mitchell, Darryl Scott, and Yondell White. Contrary to the hearing officer's recommendation, we find insufficient grounds to sustain the Petitioner's challenges to the ballots of Alberta Butler, Mary Robinson, and Elaine Washington. The Petitioner alleged that all three held supervisory positions.

Butler

The hearing officer found that diet technician Alberta Butler had no authority over other employees and thus was not a supervisor, as defined in the National Labor Relations Act. He nevertheless concluded that she should be excluded from the bargaining unit because she was a technical employee who lacked a community of interest with the other bargaining unit employees. Although we agree that she is a technical employee, contrary to the hearing officer, we find that her status as such is an insufficient basis for excluding her from the unit.

Butler reports to the same supervisor as other unit employees, has the same general working conditions and benefits, works in the same locale, has frequent, if not constant, contact with other unit employees, and occasionally does the same work as other employees when she prepares food trays for the patients. It is true that Butler, as a technical employee, has had to meet higher educational requirements than other unit employees. It is also true that she receives higher wages than most unit employees, due in part to length of service. Those considerations, however, do not necessitate her exclusion from the unit under the factors set forth in *Sheffield Corp.*,[2] and reiterated in *Park Manor Care Center*.[3] In *Sheffield*, the Board stated that it would:

> make a pragmatic judgment in each case (involving placement of technicals), based upon an analysis of the following factors, among others: desires of the parties, history of bargaining, similarity of skills and job functions, common supervision, contact and/or interchange with other employees, similarity of working conditions, type of industry, organization of plant, whether the technical employees work in separately situated and separately controlled areas, and whether any union seeks to represent technical employees separately.

Id. at 1103–1104. In finding that the facts of this case do not warrant the exclusion of Butler from the unit consisting of nursing assistants, dietary employees, and activities' employees at the Employer's health care facility, we rely particularly on the fact that technical employees were not excluded from the unit and that the stipulated unit includes all dietary employees who were not supervisors.

Robinson and Washington

The hearing officer, in recommending that the challenges to the ballots cast by Mary Robinson and Elaine Washington be sustained, agreed with the Petitioner's contention that they are supervisors. In his analysis, he relied primarily on references to them as supervisors in their job descriptions, in Food Service Director Perlinda Holliday's evaluations of them, and in warnings they received, all of which issued before questions about their eligibility arose.[4] He relied particularly on Holliday's written comments on evalua-

[1] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule the Petitioner's Objections 5,6,9, and those portions of 1, 2, 3, 4, 7, and 8 that he did not recommend be sustained.

[2] 134 NLRB 1101, 1103–1104 (1961).

[3] 305 NLRB 872, 876–877 (1991).

[4] Although there is evidence in the record concerning warnings issued by Washington and Robinson, the hearing officer did not rely on that evidence to find them supervisors. We find in any event that these warnings have not been linked to effective recommendation of disciplinary action and thus the warnings are not indicative of supervisory status.

tions and warnings, to wit: Robinson's evaluation of March 31, 1991:

> Mary needs to improve her supervisory responsibilities by taking better control over employees that she supervise. [sic] Also upon identifying work related problems, she needs to react accordingly.

Robinson's evaluation of March 19, 1992:

> Mary continues to perform in a superior manner. There is a definite improvement in her initiative, which was identified @ last review. . . . She . . . works well without my immediate supervision. She is always willing to assist where needed.

Washington's evaluation of July 30, 1991:

> Elaine . . . is . . . very good with the residents and runs the dining room well. Elaine needs to improve supervision skills by following through on assigned responsibilities while maintaining quality standards, monitoring daily/wkly cleaning scheduling, more time should be spent in enforcing dietary policies and health guidelines. Initiate [sic] should be displayed throughout overall kitchen, noticing areas of improvement or needing attention. The importance of increased responsibility is expected.

Washington's evaluation of August 14, 1992:

> Elaine . . . can function . . . [with] minimum supervision. I have identified that initiative on her behalf as being a weakness in her supervisory skills. Supervisors are expected to ensure that Dietary personnel [sic] are performing all assigned duties, and that the kitchen is clean, while maintaining . . . quality service to Residents.

Robinson received a warning after failing to call in before an absence for which she had a doctor's excuse. The warning read in part:

> I explained to her that with her position as a supervisor a certain amount of responsibility is expected of her. She is aware of the importance of call ins for scheduling purposes.

Washington received a warning for failing to maintain an updated snack list. It stated in part:

> As a supervisor, Elaine needs to realize the importance of maintaining an updated snack list as it relates to the overall kitchen operation. Should this happen again it may result in a 3-day suspension.

The hearing officer also noted that several of the warnings given to Robinson and Washington listed each one's position as ''supervisor'' and that each of them had a name tag that indicated she was a supervisor. He found that other employees viewed Washington and Robinson as supervisors and that each had authority to exercise a minimum level of independent judgment as demonstrated by Washington's overruling Holliday on whether a kitchen employee could leave early, by Washington's intervention in a problem between that employee and another one, and by Washington's response to a schedule request by the same employee.

Contrary to the hearing officer, we find that the factors he relied on do not establish that Robinson and Washington are supervisors. It is well settled that possession of the title of supervisor does not in itself confer supervisory status under the Act. *Gem Urethane Corp.*, 284 NLRB 1349 (1987), and *Bowne of Houston*, 280 NLRB 1222 (1986). We note that the warnings and evaluations that refer to Robinson and Washington as supervisors comment on activities that are not indicia of supervisory status, but rather involve the performance of routine duties. Given the heavy burden borne by the party urging exclusion, we find isolated instances of Washington's interaction with a single employee insufficient to establish that she exercises independent judgment on behalf of the employer. See *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982).

Conclusion

Although the challenged ballots which have been cast by persons found eligible to vote are sufficient to be determinative of the numerical outcome in this proceeding, we refrain from directing that they be opened and counted in view of our finding that some of both parties' election objections have merit and warrant setting aside the election, whatever the outcome.

II. ELECTION OBJECTIONS

Both parties have filed exceptions to the hearing officer's recommendation to set aside the election because of improper conduct by each of them.[5] With respect to the Petitioner's conduct, we find it unnecessary to pass on his finding that three or four anonymous phone threats made to the Employer's election observer warranted that result.[6] Rather, in affirming

[5] Both parties have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[6] Although we agree with the hearing officer that Petitioner permissibly provided free, low cost meals to attendees at its organizational meetings, we disavow his remarks suggesting that the Employer re-examine its pay structure.

We also agree with the hearing officer that a statement by a union supporter that individuals who joined the Petitioner would receive free legal services, was unobjectionable, but for reasons different

the hearing officer's finding of merit in certain of the Employer's objections, we rely solely on the conduct of Vierge Daphinis, who while serving as the Petitioner's election observer, kept a list of those who voted, commented audibly on how each voter would vote, and directed derogatory remarks at those she deemed to be against the Petitioner. Those actions destroyed the integrity of the election process by undermining measures to insure the secrecy of the ballot and creating a coercive atmosphere in the polling area.[7]

Finally, in affirming the hearing officer's finding that the Employer engaged in objectionable conduct,[8] we agree that the Employer's showing of a videotape about the PATCO[9] strike against the Federal Aviation Administration conveyed a clear message that strikers would be fired. Davis testified that the videotape that he introduced had shown not only the strike, but its consequences. No testimony was offered that any explanation was given to distinguish the demonstrated consequences of a strike by Federal employees, who were discharged for their participation in the strike, from what would occur should the Employer's employees engage in strike activity. (In contrast, the evidence indicated that, in showing another videotape concerning ties between a union and organized crime, the Employer had explained to the employees that the depiction did not apply to the Petitioner.) We find that the Employer's showing of the PATCO videotape could reasonably have led employees to believe that they could be discharged for strike activity.

[Direction of Second Election omitted from publication.]

---

from those stated by the hearing officer, who treated it as permissible campaign propaganda under *Midland National Life Insurance*, 263 NLRB 127 (1982). We rely instead on the absence of evidence that the speaker was an agent of the Petitioner. Consequently, the statement could not reasonably be accorded much weight by anyone who heard it and thus would not serve as a basis for setting aside the election. But, even if the statement had been made by a representative of the Petitioner, it merely promised benefits and was therefore permissible absent evidence that those benefits were not already available to union members or were conditioned on the promisee's demonstration of preelection support for the Union. See *Mailing Services*, 293 NLRB 565 (1989), and *Dart Container*, 277 NLRB 1369, 1370 (1985). Finally, as there is no allegation that the statement was a misrepresentation, issues addressed by *Midland* are not presented.

[7] See *International Stamping Co.*, 97 NLRB 921, 923 (1951). Nevertheless, we find that the hearing officer's reliance on *Milchem, Inc.*, 170 NLRB 362 (1968), is misplaced absent evidence that prolonged conversations took place between the observers and voters. The Petitioner, however, mischaracterizes Daphinis' comments as being trifling, innocuous, and isolated.

[8] For the reasons stated in his report, we agree that the Employer threatened employees with discharge.

Because the Employer engaged in other conduct that is objectionable here, we find it unnecessary to pass on the hearing officer's finding that the Employer also interfered with the election by promising future benefits. Additionally, we disavow the hearing officer's comments in fn. 36, which are unnecessary to the hearing officer's decision.

[9] Professional Air Traffic Controllers.